

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Amendment of the Commission's Rules)

To Preempt State and Local Regulation)

of Tower Siting For Commercial)

Mobile Services Providers)

RM No. 8577

DOCKET FILE COPY ORIGINAL

To: The Commission

AMERICAN PERSONAL COMMUNICATIONS'
COMMENTS IN SUPPORT OF THE
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION'S
PETITION FOR RULEMAKING

American Personal Communications ("APC")^{1/} supports the Petition for Rulemaking filed on December 22, 1994, by the Cellular Telecommunications Industry Association ("CTIA"). The CTIA has asked the Commission to issue a Notice of Proposed Rulemaking proposing to exercise its authority under § 2(b) and § 332 of the Communications Act of 1934 to preempt state and local governments from enforcing zoning and related regulations in a manner that bars or impedes commercial mobile radio service ("CMRS") providers from locating and constructing new towers. APC, has been granted a license to offer Personal Communications Service ("PCS") in the Washington, D.C.-Baltimore major trading area. In its efforts to establish the hundreds of base station sites necessary to offer PCS in this region, APC is now facing serious local zoning obstacles, examples of which are set forth below, that confirm the imminent need

^{1/} American PCS, L.P., d/b/a American Personal Communications.

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for the relief sought by CTIA. The Commission should issue a notice proposing preemption standards as quickly as possible.

I.

The obstacles facing APC exemplify the types of state and local interference with the growth and efficiency of CMRS that prompted CTIA's petition. The delays, unnecessary costs, and outright bars to tower siting to which local governments have subjected APC will continue to hamper development of PCS infrastructure unless the Commission exercises its authority to preempt the patchwork of local regulations.

The need for federal preemption becomes apparent when the actual, present effects of state and local enforcement of zoning and related regulations are examined. The experience of APC provides a case in point.

For example, Fairfax County, Virginia, has interpreted its zoning ordinances and taken other actions effectively to preclude APC from constructing base stations in the county. In particular, public authorities in the county have adamantly refused to allow siting of a monopole and radio equipment cabinets on county properties in the Hunter's Valley area of the county (where APC must have a site to provide effective service to that area), even though Fairfax county has a communications policy that states that public properties are the first choice for communications sites and that monopoles up to 199 feet are permitted uses on such properties. In fact, in any application to Fairfax County for a base station site that will not be located on a public property, the applicant must file a justification statement detailing why it has *not* located

its site on public property. In the Hunter's Valley area, the only non-public properties are residential.

Consequently, APC was required to seek approval for constructing a base station on residential property. Under county ordinances, the Fairfax County Planning Commission and Board of Supervisors must approve a special exception in order to permit placement of a monopole on residential property. APC leased an appropriate site on a large property, screened by trees and well-spaced from residences other than the landlord's, and applied for a special exception for a 150-foot monopole and two small cabinets of radio equipment (APC's base station sites do not require an equipment building.) A month after APC filed its application, on December 12, 1994, the Fairfax County Office of Comprehensive Planning responded that a base station could not be located on a residential property anywhere in Fairfax County because only one principal building could be located on residential property, and APC's equipment cabinets would constitute a second principal building. The county took this position despite the fact that under the county's building code, APC's equipment cabinets do not constitute a "building." If the Office of Comprehensive Planning refuses APC's request to reconsider its decision, APC's only recourse may be to appeal the decision to the Planning Commission and Board of Supervisors, a process which could result in a six to eight month delay in consideration of APC's application -- and a concomitant delay in APC's ability to provide effective PCS service to Fairfax County.

APC's experience in Fairfax County demonstrates the costly, time-consuming, and potentially preclusive effects that local zoning regulations often have on

the efforts of mobile services providers to develop essential infrastructure. Moreover, the situation in Fairfax County is by no means unique.

In Culvert County, Maryland, for instance, the county established a nine-month moratorium on the construction of communications towers, effective May 31, 1994. The purpose of the moratorium was purportedly to give the county an opportunity to consider a comprehensive amendment to the existing zoning ordinance. Though the county's conduct did not adversely target APC specifically, it typifies the delaying tactics local jurisdictions may use to frustrate mobile services providers' site acquisition efforts.

Another consequence of non-federal regulation of tower siting is that CMRS providers are subjected to the vagaries of disuniform state and local judicial regimes. For example, a Maryland state court recently set forth in Cromwell v. Ward, No. 614, 1995 Md. App. LEXIS 9 (Md. Ct. Spec. App. 1995), an especially onerous burden for a property owner seeking a variance. The court stated that a variance applicant must demonstrate that the property is so peculiar or unusual that it is disproportionately affected by the applicable zoning restrictions. This heavy burden will hamstring APC's site selection process throughout Maryland, because the company will be forced to avoid all sites for which a variance would be required, such as variances that may be necessary for height or set-back requirements.

In addition, imposition of excessive costs, which impede the development of competitive and efficient mobile services, often result from enforcement of disparate and unreasonable state and local regulations. To illustrate, according to the zoning ordinance in Anne Arundel County, Maryland, a base station site is defined as a public

utility activity, even though the state does not consider wireless providers to be public utilities. In that county, all public utilities must apply for a special exception for installation of their facilities in all but two zones. APC has planned approximately 20 sites in Anne Arundel County, all of which will require such approval. Obtaining special exceptions in the county is a burdensome process, which requires APC to incur legal and consulting expenses for facilities that are permitted by right in equivalent zones in neighboring jurisdictions, such as Prince George's and Montgomery County. This burden is compounded by the fact that the county deems base station sites to be principal structures, and at the same time prohibits multiple principal structures on a single lot. APC must therefore seek multiple use approval for any intended base station sites on which a principal structure already exists. In combination, the special exception and multiple use approval processes could consume several months.

The situations described above demonstrate the need for a uniform, predictable system of regulating the development of CMRS infrastructure, that permits state and local regulation only to the limited extent that it is necessary and reasonable.

II.

As explained in CTIA's petition, the Commission is empowered to promulgate uniform, preemptive regulations governing the development of mobile services infrastructure. Such regulations are practicable and have been adopted by the Commission in other areas. A provision for CMRS zoning disputes could, in basic terms, be based generally upon the Commission's action in promulgating Section 25.104 of its rules, 47 C.F.R. § 25.104 (1993), which provides for preemption of local zoning

of earth stations. That section generally preempts state and local zoning or other regulations that discriminate against earth stations. It also, however, permits enforcement of such state and local regulations so long as they have reasonable and clearly defined health, safety, or aesthetic objectives, and so long as they do not impose unreasonable limitations or excessive costs.^{2/} The federal regulation thus achieves a balance between federal and local interests in the specific case of satellite earth stations.

Similarly, a new Commission rule concerning preemption of zoning restrictions on CMRS infrastructure could recognize *legitimate* local interests in health, safety, and aesthetic regulation, while also constraining such regulation on the basis of reasonableness principles. A rule for CMRS zoning disputes, however, must be tailored more specifically to prevent zoning agencies from seizing upon pretenses based upon "aesthetic" or "safety" concerns to deny zoning to PCS providers. It also must prevent local authorities from discriminating among different types of CMRS providers -- local zoning agencies must not be permitted, for example, to deny siting authority to PCS providers when they have granted such authority to cellular providers. These considerations should be considered in the Commission's notice of proposed rule making

^{2/} Specifically, 47 C.F.R. § 25.104 provides in pertinent part:

State and local zoning or other regulations that differentiate between satellite receive-only antennas and other types of antenna facilities are preempted unless such regulations:

- (a) Have a reasonable and clearly defined health, safety or aesthetic objective; and
- (b) Do not operate to impose unreasonable limitations on, or prevent, reception of satellite delivered signals by receive-only antennas or to impose costs on the users of such antennas that are excessive in light of the purchase and installation cost of the equipment.

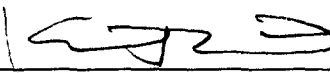
in response to CTIA's petition and more fully developed in the comments of the parties. Because PCS providers are facing zoning obstacles *now*, we urge the Commission to act quickly in issuing such a notice and to set an efficient comment-and-reply schedule.

* * *

For the reasons stated in CTIA's petition, as supported by the factual information provided above, APC joins in CTIA's request that the Commission issue a Notice of Proposed Rulemaking proposing to preempt state zoning and other regulations that bar or impede development of CMRS tower sites.

Respectfully submitted,

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